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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 968

MILTON BRADLEY COMPANY AND A. C. McCLURG & COMPANY,

Petitioners,

vs.

THE GELLES-WIDMER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY BRIEF.

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CITATIONS.

CASES.

	PAGE
B & B Auto Supply, Inc. v. James Plesser, 205 F. Supp. 36 (S. D. N. Y. 1962)	4
Dan Kasoff, Inc. v. Gresco Jewelry Co., Inc., 204 F. Supp. 694 (S. D. N. Y. 1962)	3
Densmore v. Scofield, 102 U. S. 375 (1880)	6
Doran et al. v. Sunset House Distributing Corp., 197 F. Supp. 940 (S. D. Cal. 1961)	3
Fleischer Studios, Inc., et al. v. Ralph A. Freundlich, Inc., et al., 73 F. 2d 276 (2 Cir. 1934)	4
Harry Alter Co. v. Graves Refrigeration, Inc., 101 F. Supp. 703 (N. D. Ga. 1951)	4
Hollywood Jewelry Mfg. Co., Inc. v. Dushkin, 136 F. Supp. 738 (S. D. N. Y. 1955)	3
Mifflin v. Dutton, 107 Fed. 708 (D. Mass. 1901)	5
Mifflin v. Dutton, 190 U. S. 265 (1903)	5
Mifflin v. R. H. White Company, 190 U. S. 260 (1903)	5
National Comics Publications, Inc. v. Fawcett Publications, Inc., 93 F. Supp. 349 (S. D. N. Y. 1950)	4
National Comics Publications, Inc. v. Fawcett Publications, Inc., 191 F. 2d 594 (2 Cir. 1951)	3, 4
Schenley Distillers Corp. et al. v. United States, 326 U. S. 432 (1946)	3
Trifari, Krussman & Fishel, Inc. v. B. Steinberg-Kaslo Co., 144 F. Supp. 577 (S. D. N. Y. 1956)	3
United States v. Paramount Pictures, Inc., et al., 334 U. S. 131 (1948)	6

Werckmeister v. Springer Lithographing Co., 63 Fed. 808 (S. D. N. Y. 1894) 3
Woodman v. Lydiard-Peterson Co., 192 Fed. 67 (D. Minn. 1912) 4

STATUTES.

17 U. S. C.:
§ 1 2
§ 10 ..... 1, 2
§ 19 ..... 1, 2

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This reply is made necessary by respondent's spurious restatement of the question presented. It will be understood that respondent's arguments not specifically discussed herein were anticipated and adequately covered in the petition.

We first note that the stricture[1] which respondent would apply to petitioners' "Question Presented" is unwarranted. That question has not been misstated; neither have petitioners erroneously asked whether a court may "excuse compliance with the provisions of 17 U. S. C. §§ 10, 19." This is precisely what the courts below did when

1. Respondent's Brief, p. 4.

they approved and accepted the deliberate use in the copyright notice upon thousands of copies of the copyrighted work of the *name of a non-proprietor* in the face of the requirements of Sections 10 and 19 that a prescribed notice "accompanied by the name of the copyright proprietor" shall be affixed to "each" copy of the copyrighted work "published or offered for sale."

Respondent argues that the actual copyright proprietor may deliberately use, or permit the use of, the names of non-proprietors in the prescribed notice and still be in full compliance with the provisions of Sections 10 and 19. Respondent thus argues for the virtual nullification of these sections, something which Congress has for many years consistently refused to do.

If Sections 10 and 19 stand nullified, as respondent in effect contends, then, indeed, petitioners have "misstated" the question, for if compliance is not required, it follows that no excuse was needed for respondent's non-compliance. But if these provisions are still in force and effect, as no doubt they are, then compliance with them is required, as demanded by 17 U. S. C. § 1; and when, as here, the copyright proprietor, *i.e.* respondent, has admittedly permitted thousands of the copyrighted works to be published and sold with a copyright notice deliberately misstating the name of the copyright proprietor, then respondent has either lost its copyrights or it must provide a valid and sufficient excuse for its non-compliance. The basis for the present petition is that the excuse offered by respondent and accepted by the court below was neither valid nor sufficient. Surely respondent is guilty both of quibbling and of begging the issue when it seeks refuge in the very conclusion of the court below which the instant petition challenges as a matter of law.

The chief trouble with respondent's attempted restate-

ment of the question presented is that there is no basis whatever for respondent's assertion that the questioned notice was in the "tradename of an adjunct of the party in whose name the copyright was secured."[2] This contention is made for the first time in this Court, and respondent signally fails to cite any evidence in the record that "School Aids Products Co." is a tradename either of respondent or of any adjunct of respondent. On the contrary, this name is the full corporate title of a separate and distinct legal entity.[3]

Moreover, neither the Second Circuit, in the *National Comics* case, nor the court below, in the instant case, rested their decisions here questioned on the so-called permissible tradename principle. It is one thing to hold that the statutory requirements are met by the use of the tradename by which the copyright proprietor is known, as was the case in *Doran* v. *Sunset House Distributing Corp.*, 197 F. Supp. 940 (S. D. Cal. 1961)[4] and quite a different thing to hold, as was

2. Respondent's Brief, p. 5.

3. It makes no difference whether the separate corporation is described as an "adjunct" of respondent or as a sister corporation, which was the expression used in the court below. This Court has said in *Schenley Distillers Corp.* v. *United States*, 326 U. S. 432, 437:

> "... One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public."

4. As pointed out in *Werckmeister* v. *Springer Lithographing Co.*, 63 Fed. 808, 810 (S. D. N. Y. 1894), the tradename principle is grounded in the common law: "if persons trade or carry on business under a name, style, or firm, whatever may be done by them under that name is as valid as if real names had been used." Other tradename cases relied on by respondent (Brief p. 7) which similarly have no relevancy here are *Dan Kasoff, Inc.* v. *Gresco Jewelry Co.*, 204 F. Supp. 694 (S. D. N. Y. 1962); *Trifari Krussman & Fishel, Inc.* v. *B. Steinberg-Kaslo Co.*, 144 F. Supp. 577 (S. D. N. Y. 1956), and *Hollywood Jewelry Mfg. Co., Inc.* v. *Dushkin*, 136 F. Supp. 738 (S. D. N. Y. 1955).

held in *National Comics* and in the instant case, that the requirements are met by a notice in the name of a non-proprietor.[5]

Fleischer Studios, Inc. v. *Ralph A. Freundlich, Inc.*, 73 F. 2d 276 (2 Cir. 1934),[6] involved a notice where there was an innocent omission of the abbreviation "Inc." from the name of the copyright proprietor. If this decision anticipated the *National Comics* case, in any respect, it was only in the fact that both cases involved innocent variations,[7] whereas respondent's variation was deliberate and made for financial gain. *Harry Alter Co.* v. *Graves Refrigeration, Inc.*, 101 F. Supp. 703 (N. D. Ga. 1951),[8] involved a case of substantial compliance, and was decided on the authority of the *Fleischer Studios* case. These cases have no relevancy[9] in the case at bar, where there certainly was no effort to comply with the statute. Use of the name of a non-proprietor can by no stretch of the imagination be deemed an effort to comply with a provision requiring that the name of the proprietor be used.

Finally, it is noted that respondent's contentions that

5. *B & B Auto Supply, Inc.* v. *Plosser*, 205 F. Supp. 36 (S. D. N. Y. 1962) (Respondent's Brief, p. 7), involved the use of the name of a non-proprietor. The court in that case undoubtedly considered itself bound by *National Comics* as being the law of the circuit.

6. Respondent's Brief, pp. 7-8.

7. See 93 F. Supp. 349, where it appears that in *National Comics* there was an agreement between Detective Comics, Inc., and Superman, Inc., by virtue of which Superman, Inc., innocently assumed the right to use its name in the copyright notices and thereafter perfect the copyrights, a mistake which when discovered was immediately rectified by the parties.

8. Respondent's Brief, p. 7.

9. Respondent's reliance (Brief, p. 7) on *Woodman* v. *Lydiard-Peterson Co.*, 192 Fed. 67 (D. Minn. 1912), appears also to be misplaced. The notice in the copyrighted book in that case was admittedly proper and the question involved was whether the copyright covered a map included in the book.

Mifflin v. *White* and *Mifflin* v. *Dutton* compel the result reached in the instant case, are untenable.[10] In *Mifflin* v. *White*, this Court expressly *assumed that the Ticknor & Fields copyright was perfected with the authority of Dr. Holmes* and considered the effect of two different copyright notices and two different copyright proprietors for a single copyright. It is in the portion of the opinion dealing with this assumption where the principles applicable to the case at bar are found. And, contrary to respondent's contentions, Mrs. Stowe's copyrighted chapters in *Mifflin* v. *Dutton* were published in the *Atlantic Monthly* "in accordance with an arrangement with Mrs. Stowe" (190 U. S. 265) and there was identity of interest in the broad sense. Indeed, in the Circuit Court, Judge Colt considered the contention that "Ticknor & Fields were the agents of Mrs. Stowe" and specifically rejected as unsound the assertion that use of an agent's name in a copyright notice satisfied the statute (107 Fed. 710).

Conclusion.

In the instant case, petitioners have been found guilty of copyright infringement because the courts below found that the respondent's copyrighted flash cards protected such uncopyrightable matters as the basic arithmetical facts, notwithstanding that the alleged author protested: "Sir, I would never say that I created two plus two."[11] In these circumstances it is hardly appropriate for respondent to wax eloquent concerning petitioners' dislike for the decision below. There is more at stake in this case than the rights of respondent and petitioners. The law, in allowing the copyright privilege, has not failed to protect the rights of the public; on the contrary, it has safeguarded them.

10. Respondent's Brief, pp. 8-10.

11. Appendix to Brief for Defendants (7 Cir.) p. 111.

Thus, while patentees and copyright proprietors have rights, the public have rights also. "The rights of both should be upheld and enforced by an equally firm hand, wherever they come under judicial consideration." *Densmore* v. *Scofield*, 102 U. S. 375, 378. "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration." *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 158.

Respectfully submitted,

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